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In the Supreme Court of the United States

OCTOBER TERM, 1950

THE TIMKEN ROLLER BEARING COMPANY,
APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

MEMORANDUM IN OPPOSITION TO MOTION FOR POSTPONEMENT OF ORAL ARGUMENT TO OCTOBER TERM, 1951

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MEMORANDUM IN OPPOSITION TO MOTION FOR POSTPONEMENT OF ORAL ARGUMENT TO OCTOBER TERM, 1951

Appellee, the United States of America, opposes the motion filed by appellant requesting postponement of the oral argument in the above-entitled case until the October, 1951 term. Appellant's request is based on the pendency of a motion filed by it in the District Court on January 24, 1951, six months after the petition for appeal was filed and

allowed by the District Court on July 28, 1950, and more than two months after this Court noted probable jurisdiction on November 6, 1950.

The United States is constrained to oppose postponement of the oral argument not only because it would be contrary to the rule of expeditious hearing of antitrust cases but also for the following specific reasons: (1) appellant's motion in the District Court of January 24, 1951, is on its face completely lacking in substance or merit, and indeed approaches the frivolous; (2) appellant's motion for postponement of argument in this Court is premature, since ample time still remains for the District Court to act upon the motion before the probable date when argument would be heard in this Court.

I

Appellant's motion in the District Court is patently without any substantial basis because that court has already decided all the matters presented in the motion, and no novel or meritorious issues are raised therein. Hence it is extremely probable that the District Court will promptly deny appellant's motion; but even if it should not, the pendency of such motion does not affect the issues on this appeal, and provides no warrant for postponement of the oral argument before this Court.

The motion was based upon the premise that there had been a material change of circumstances following the filing of the appeal. The occasion

which allegedly constituted a material change of circumstances was the death of Michael Dewar on December 21, 1950, and the desire of appellant to exercise certain options to purchase shares of stock owned by Dewar in the co-conspirator corporations, British Timken Limited (herein called "British Timken") and Societe Anonyme Francaise Timken (herein called "French Timken").

The options which appellant stated it wished to exercise were in evidence at the trial (D. Ex. 228, R. 2539-41; D. Ex. 240, R. 2660-1). The District Court, in Section VIII B of its final judgment entered on February 15, 1950, specifically prohibited appellant from exercising these options, as follows (R. 1179):

> B. Defendant is hereby enjoined and restrained, from the date of this judgment, from:
>
> 1. Acquiring, directly or indirectly, any ownership interest in (by purchase or acquisition of assets or securities, or *through the exercise of any option, or otherwise*), or any control over, British Timken or French Timken, or any subsidiary, successor or assign thereof;
> 2. Exercising any influence or control over the production, sales or other business policies of British Timken or French Timken, or any subsidiary, successor or assign, agent, sales representative, or distributor thereof;
> 3. Causing, authorizing or knowingly permitting any officer, director, or employee of

> defendant or its subsidiaries to serve as an officer, director, or employee of British Timken or French Timken or of any subsidiary, successor, assign, agent, sales representative, or distributor thereof. [Emphasis supplied]

The District Court also, in Section IV B of its judgment, cancelled the agreement of March 22, 1948 (D. Ex. 240, R. 2659-2662), which granted to appellant the option on British Timken shares which it now wishes to exercise, as follows: (R. 1175):

> B. Each of the following agreements, entered into during the trial of this action, is hereby terminated; and defendant is hereby enjoined and restrained from the further performance or enforcement of any of the provisions of said agreements and of any agreements amendatory thereof or supplemental thereto:
>
> 1. Agreement dated March 22, 1948 between defendant and Michael B. U. Dewar, Esq., entitled "Agreement with respect to British Timken Limited";

Dewar's death was, in fact, only one of the contingencies named in the agreements which gave appellant options to purchase Dewar's British Timken and French Timken shares. For example, other contingencies named in the agreement as giving rise to such an option on British Timken shares were (1) Dewar's incapacity for a period of six

consecutive months, and (2) Dewar's decision during his lifetime to sell such shares.[1] The agreement also gave Dewar an option on appellant's shares should it have decided to sell (D. Ex. 240, par. 1(d), R. 2660-1). In addition, it gave both appellant and Dewar the right to approve or disapprove, with or without reason, any purchaser found by the other party (D. Ex. 240, par. 2, R. 2661). Similar contingencies were named in the option agreement as to French Timken shares (D. Ex. 228, R. 2539-41).

These various contingencies were all before the District Court when it entered its final judgment. That court might have provided for the exercise of the options upon the occurrence of one or more of the contingencies, but instead it flatly prohibited appellant from acquiring any interests in British Timken or French Timken "through the exercise of any option, or otherwise".

Appellant states in paragraph 4 of its motion

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[1] The British option agreement provided in part as follows (D. Ex. 240, par. 1, R. 2660):

> (a) Upon the death of Mr. Dewar or if he shall become incapacitated by ill health or otherwise for a consecutive period of six months from discharging his duties as a Director of British Timken Limited . . . [appellant] shall have an option to purchase all or any of the 94960 ordinary Shares in British Timken now belonging to Mr. Dewar or his assigns . . .
>
> (b) In the event of Mr. Dewar or his assigns or his or their legal representatives . . . desiring to sell all or any of the Dewar Shares [appellant] shall have an option to purchase all or any of such Shares which option shall be independent of the option in favor of . . . [appellant] provided for in paragraph (a) hereof.

for postponement of oral argument that it has already exercised the option on British Timken shares and part of the option on French Timken shares (even though such exercise was specifically banned by Section VIII B of the judgment), apparently on the basis of a stay of execution of its final judgment granted by the District Court on July 28, 1950 (R. 1255). Whatever may be the propriety of appellant's action pending appeal, certainly appellant has done it at the peril of having to divest itself of the stock so acquired along with that previously held, in the event that this Court affirms Section VIII A of the judgment, which provides (R. 1179):

> A. Within two years from the date of this judgment, defendant shall divest itself of all stock holdings and other financial interests, direct or indirect, in British Timken and French Timken. Within one year from the date of this judgment, defendant shall present to the Court for its approval a plan for such divestiture.

Appellant held 30.25 per cent of the ordinary shares of British Timken (Fg. 66, R. 971) and 50 per cent of the outstanding stock of French Timken (Fg. 54, 66, R. 969, 971). Dewar held approximately 25 per cent of the outstanding ordinary shares of British Timken (Fg. 66, R. 971), and 50 per cent of the outstanding stock of French Timken (Fg. 54, 66, R. 969, 971). Appel-

lant states that it has acquired from Dewar's estate all of his ordinary shares of British Timken, and stock of French Timken representing one vote at stockholder's meetings, both purchases being made pursuant to the options exercisable at Dewar's death; and that it proposes to purchase the remainder of French Timken stock pursuant to a right of first refusal. This option of first refusal on the remainder of French Timken shares was not exercisable upon the contingency of Dewar's death, which appellant claims was the change of circumstances justifying reopening of the judgment, but rather upon the decision of Dewar's holding company to sell, which decision might have been made either during Dewar's lifetime or after his death (D. Ex. 228, R. 2541). Thus, appellant is contending in effect that the occurrence of any of the contingencies named in the option agreements before the District Court justifies reopening the judgment. If this contention has any merit, then the District Court performed a useless act indeed when it specifically enjoined any exercise of the options.

Because the District Court has already acted upon the question of whether exercise of the options should be allowed upon the occurrence of any of the various contingencies, the occurrence of one of the contingencies manifestly is not a material change of circumstances which would justify re-

opening that court's judgment.[2] And, since the record is complete as to the lower court's action regarding exercise of the options, this Court is in a position to review completely that court's action.[3] Therefore, no purpose, other than delay in final disposition of the appeal, will be served by postponement of oral argument to the October term, 1951.

II

Appellant's motion for postponement of oral argument in this Court is, in any event, premature. There is no reason to suppose that the District Court will not act upon appellant's motion there well before the date of oral argument in this Court. We have been advised by the Clerk of this Court that such argument could be set for the week of April 23, 1951. Since probable jurisdiction in this case was noted on November 6, 1950, and the record on appeal has already been printed, there are no impediments (other than appellant's motion for postponement) in the way of early argument of this case. The District Court, at the hearing on appellant's motion on February 14, 1951, indicated that it would take "at least thirty days or more to

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[2] A copy of appellee's memorandum in opposition to appellant's recent motion in the District Court is attached as Appendix.

[3] The printing of the record on appeal was finished on February 28, 1951. Appropriate references have been made above to the printed record. Dewar's death, the single fact not in the record, is now known to this Court, and may be considered for whatever bearing it may have on the appeal.

get to the matter". But in view of the motion's patent lack of merit, the District Court may well decide the motion within a very short time after it begins consideration thereof about the middle or end of this month, and will probably render its decision prior to April 23.[4]

The motion in the District Court, if denied before April 23, as is likely, would present no bar to oral argument. The additional record to which appellant refers in paragraph 9 of its motion for postponement of argument, if received by this Court, would be small and should entail no delay. Part of the additional matter is already contained in the papers filed with this motion. The District Court's order denying the motion could readily be transmitted to this Court. But even if the District Court should grant appellant's motion prior to April 23, and ask leave of this Court to conduct additional hearings, then this Court could at that time decide whether a delay in oral argument of this appeal would be justified.

Moreover, the pendency of the motion below, even while unacted upon by the District Court, should not in any way preclude this Court from proceeding to hear the appeal. In its very nature, that motion presents no conflict with this Court's early consideration of the appeal. Appellant captioned it as a motion that the District Court

[4] The District Court stated that it could not give immediate consideration to the motion because of the press of other matters.

ask leave of this Court to consider appellant's motion that the District Court receive additional evidence and reconsider its final judgment, etc. The pendency of such a motion, even if meritorious, as this one is not, presents no reason for this Court to delay disposition of the appeal. Unless and until such motion should be granted by the District Court, the *status quo* remains unchanged. Only the grant of appellant's motion by the District Court could involve such a change in the *status quo* as to require this Court to consider whether it should delay passing upon the appeal before it.

Appellant states in paragraph 9 of its motion for postponement that if the argument is not deferred until October, 1951 it must "commence forthwith the preparation of a brief in this Court". This statement seems to admit that appellant has taken no steps towards preparation of a brief in this Court, even though the appeal was allowed on July 28, 1950, and this Court noted jurisdiction over three months ago, on November 6, 1950. Further, it is not impracticable, as appellant contends in its motion, for appellant to undertake the preparation of a brief in this Court before the District Court has ruled on the pending motion, since appellant must prepare such a brief in any event, unless it intends to abandon its appeal.

For the reasons stated, it is respectfully submitted that appellant's motion requesting postponement of oral argument of this appeal to the October Term, 1951 should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MARCH 6, 1951

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Filed February 14, 1951

Civil Action No. 24,214

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

THE TIMKEN ROLLER BEARING COMPANY, *Defendant-Appellant*

PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION THAT THIS COURT ASK LEAVE OF THE SUPREME COURT OF THE UNITED STATES TO CONSIDER DEFENDANT'S MOTION THAT THIS COURT RECEIVE ADDITIONAL EVIDENCE AND RECONSIDER ITS FINAL JUDGMENT HEREIN AND, IF LEAVE BE GRANTED, THAT THIS COURT PROCEED SO TO DO, BECAUSE OF CHANGED CIRCUMSTANCES DUE TO THE DEATH OF MICHAEL B. U. DEWAR SINCE THE PERFECTION OF AN APPEAL HEREIN TO THE SUPREME COURT OF THE UNITED STATES

The plaintiff-appellee opposes the motion, filed with this Court on January 24, 1951, in which defendant-appellant moved that this Court (1) ask leave of the Supreme Court of the United States to consider defendant-appellant's motion

that this Court (a) receive additional evidence, (b) make additional findings of fact and conclusions of law, and (c) vacate its judgment entirely, or vacate and modify portions of Sections IV and VIII thereof; and (2) if leave be granted, that this Court proceed to take such steps.

The occasion for the motion is alleged to be the death of Michael Dewar on December 21, 1950, and the desire of defendant-appellant (hereinafter called "defendant") to acquire additional shares in British Timken and French Timken, pursuant to certain options exercisable at Dewar's death.

Defendant's proposed acquisition of additional stock in British Timken and French Timken is directly prohibited by the final judgment entered in this case on February 15, 1950. In Section VIII B of the judgment, this Court perpetually enjoined defendant from (1) acquiring any interest in British Timken or French Timken, or (2) controlling their business policies, or (3) permitting any officer, director, or employee of defendant to serve as an officer, director, or employee of British Timken or French Timken.

Section VIII A of the judgment required defendant, within two years after the judgment, to divest itself of all stock holdings and other financial interests, direct or indirect, in British Timken and French Timken, and to present a plan for such divestiture to the Court for approval within one year. Section IV B cancelled the agreement of March 22, 1948, which granted to defendant the

option on British Timken shares which it now wishes to exercise.

The primary purpose of defendant's present motion is to require the vacation of the entire final judgment entered by this Court. At the minimum defendant seeks vacation of Sections IV B and VIII B of the judgment, and modification of Section VIII A to permit defendant either to sell present interests or to buy additional shares in those companies.

Plaintiff-appellee is opposed to the granting of any portion of the motion. The facts alleged therein do not justify vacation of the entire judgment or the vacation or modification of any part thereof. Consequently, it would be useless for this Court to grant the preliminary portions of the motion involving asking leave of the Supreme Court for permission to receive additional evidence and reconsider the final judgment, and to take such steps if leave is granted. Therefore, defendant's motion should be denied in its entirety. (A trial court may properly deny a motion for the receipt of additional evidence and reconsideration of its judgment, where the evidence if received, would not have changed the result previously reached. *Union Bleachery* v. *United States*, 176 F. (2) 517 (C.C.A. 4, 1949).)

The inadequacy of the facts alleged in the motion to justify vacation or modification of the judgment in whole or in part will be considered below.

I

Dewar's death does not, as stated in paragraph 1 of defendant's motion, change the basis upon

which this case was tried or upon which relief was granted.

The agreement giving defendant an option to purchase Dewar's shares in British Timken, in the event of Dewar's death, was executed the day the trial in this case started, and was introduced in evidence at the trial (D. Ex. 240), as well as the hearing on relief (P. Ex. 3 (Decree)). It was cancelled by this Court in Section IV B of its final judgment, and is at the present time "in full force and effect", as defendant states in paragraph 3 of its motion, only because a stay of all of the provisions of the final judgment pending appeal was granted by this Court on July 28, 1950. The agreement of December 11, 1935, granting defendant an option at Dewar's death to purchase one of his shares in French Timken, and, as to the remainder of Dewar's stock in French Timken, the right of first refusal, was likewise in evidence at the trial (D. Ex. 228).

The holdings of defendant and of Dewar in British Timken and French Timken were, at the time of the trial (Fg. 54, 66) and of the relief hearings (Hg. Tr. 28-9, 32, 43, 209-210), the same as they are stated to be at present in paragraphs 3 and 4 of the defendant's motion.

The recently executed British option agreement was discussed extensively at the hearing on relief (Hg. Tr. 132-176, 199, 204-6, 290-1). It was also discussed in plaintiff-appellee's brief in support of its proposed final judgment filed October 24, 1949, in part as follows:

> The two Agreements (P. Ex. 2 and 3 (Decree)) executed by defendant on March 22, 1948, the day the trial in this action began,

should be terminated not only because they are a continuation of the illegal conspiracy, but also because they contain provisions which will interfere with the divestiture of defendant's shares.[4] Plaintiff believes it well-established that this Court has the authority to cancel all contracts to which the defendant is a party where the effect of the contracts would be to interfere with or nullify an order of the Court.

Section 1(c) of the Agreement between defendant and Dewar (Pl. Ex. 3 (Decree)) gives Dewar an option to purchase defendant's shares in the event that defendant should wish to sell them. This option was preceded by a somewhat similar one, relating to Timken Holdings Limited shares, contained in Art. 28 of the Articles of Association of Timken Holdings Limited, dated August 31, 1935.[5]

Section 2 of that Agreement gives Dewar the right to approve any other purchaser whom defendant may find, before a transfer of defendant's shares may be accomplished. This right of Dewar to approve other purchasers is not limited, and hence amounts on its face to a complete right in Dewar to bar any transfer of shares held by defendant in British Timken. This absolute right to approve or disapprove a purchaser of defendant's British Timken stock was preceded by an "honorable understanding" contained in Sec. 1 of the Agreement of September 7, 1935

[4] The contracts would serve no useful purpose in any event should divestiture be ordered, since they were designed to maintain the control arrangements in British Timken (Hear. 136), and are thus dependent upon defendant having an interest in that company.

[5] The Articles of Association were furnished plaintiff by defendant's counsel subsequent to the recent hearing. Pursuant to the arrangement made at the hearing, plaintiff now offers these Articles as Pl. Ex. 7 (Decree).

(P. Ex. 4 (Decree)), that Dewar (a) would not "unreasonably" stand in the way of defendant selling its stock, and would object to a purchaser only "on reasonable grounds", and (b) would take all steps within his power to bring about a registration on the company's books of defendant's shares to the purchaser.

The 1948 Agreements thus differed from the earlier Agreements in that the defendant was for the first time under a legally binding obligation to give Dewar a veto power over the transfer of its stock holdings, a power which could be exercised without assigning reasonable or any other grounds.

Dewar's death was in fact only one of the contingencies named in the agreements which gave defendant options to purchase Dewar's British Timken and French Timken shares. Another contingency named in the agreements as giving rise to such an option was Dewar's decision during his lifetime to sell such shares. The agreements also gave Dewar options on defendant's shares should it have decided to sell. Furthermore, they gave both defendant and Dewar the right to approve or disapprove, with or without reason, any purchaser found by the other party. This Court was cognizant of these contingencies when it entered its final judgment with Section IV B and VIII A and B as integral parts thereof. These sections of the judgment would have little effect if every contingency foreseen in the option agreements should serve as a basis to render the judgment open to reconsideration.

The fact that the contingency of Dewar's death was before the Court when it cancelled the British option agreement, ordered divestiture and en-

joined future acquisitions, clearly indicates not only that the basis of the Court's decision and judgment has not changed, but also that no grounds have been stated upon which defendant's motion could be granted.

II

Defendant's intent and proposal, expressed in paragraph 6 of its motion, to exercise the above-described options, is, as has been pointed out, specifically prohibited by Sections IV B and VIII B of the final judgment. Though the execution of this order of the Court is stayed pending appeal, any such exercise of the option by defendant must be at the peril of having to divest itself of any newly acquired stock along with that previously held, should the Supreme Court affirm Section VIII of this Court's judgment as it was entered.

III

Exercise of the options will not, as defendant contends in paragraph 11 of its motion, raise legal questions not considered or decided by this Court.

The fact of additional stock ownership resulting from exercise of the options will not change or in any way affect this Court's previous determination that defendant and its co-conspirators, British Timken and French Timken, violated the Sherman Act for a period of many years. Nor will such additional stock ownership change or in any way affect the relief ordered by this Court, including the Court's order that defendant divest itself of all its financial interests in British Timken and French Timken, and refrain from acquiring such interests in the future.

The purpose of this relief was to remove obstacles to competition between defendant, British Timken and French Timken imposed by the illegal conspiracy in restraint of trade. The relief was fully justified by the past violations and the threat of future restraints upon competition. Indeed, defendant's proposal now to purchase additional shares in French Timken and British Timken so as to make them controlled subsidiaries shows clearly defendant's continuing intention to suppress competition between itself and these companies. As subsidiaries they will not compete with defendant, nor defendant with them. As defendant's counsel said at the trial "it wasn't anything that could be expected in common sense, that Michael Dewar would compete, if he had a company of his own, with British Timken, or for us to compete with British Timken" (T. 2784.) Thus the wisdom and necessity of the Court's order has already been demonstrated.

Even conceding for argument that defendant might originally have "conducted its operations in the British Empire and Europe through British Timken and French Timken as a majority owned subsidiary" (Def. Motion, par. 11), it does not follow that defendant, after choosing many years ago to make illegal restrictive agreements with potential competitors, may now reap, as a reward for its past violation, the right to acquire control of its co-conspirators, and thus to achieve completely the non-competitive purpose of its conspiracy. The effects of its past violation may not be so easily wiped out. The courts do not permit violators of the antitrust laws to benefit as a result of their violations, by extending and perfecting

their plans to eliminate competition. As the Supreme Court said regarding divestiture of jointly held theatres in the movie industry, in a case cited to this Court by plaintiff-appellee in connection with the proposed judgment (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 152-3 (1948)):

> To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested. *And no permission to buy out the other owner should be given a defendant.* . . . . Moreover, even if lawfully acquired, they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified. . . . In that situation *permission to acquire the interest of the independent would have the unlawful effect of permitting the defendants to complete their plan to eliminate him.*
>
> Furthermore, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. For that joint ownership would afford opportunity to perpetuate the effects of the restraints of trade which the exhibitor-defendants have inflicted on the industry. [Emphasis supplied.]

The original acquisition of British Timken and French Timken stock by defendant in 1927-8 was illegal because it was part and parcel of the conspiracy to eliminate competition between defendant and those companies. Further acquisitions in 1951 of stock in the same companies can certainly have no effect other than to continue and extend

the purposes of that conspiracy. It would follow that the acquisitions now proposed by defendant would be in themselves illegal, as further steps in the illegal conspiracy already found to exist by this Court.

IV

Vacating Sections IV B and VIII B and amending Section VIII A, the minimum action required by defendant's motion, would have the effect of nullifying most of the remaining provisions of the judgment. For example, Section V of the judgment enjoins defendant from combining with British Timken, French Timken or their subsidiaries for the purpose of allocating markets, restraining production or engaging in other listed restrictive practices. Section VII of the judgment likewise is confined to prohibition of concerted action by defendant with British Timken, French Timken or their subsidiaries, and enjoins these companies from transferring patent licenses, know-how, or trade mark rights upon designated restrictive conditions. Section VI of the judgment, though relating only to unilateral action by defendant, is concerned mainly with such action in connection with British Timken or French Timken, as for example, referral of orders to those companies, and acting as their distributor. These three judgment sections, which, with Sections IV, VIII and IX, comprise the bulk of the judgment, have meaning only so long as British Timken and French Timken are independent of defendant, and would be rendered utterly ineffective if Sections IV and VIII are modified as defendant wishes. Possibly this is the reason defendant has frankly asked, as

its primary request, that this Court vacate its entire judgment.

V

Even assuming that these other portions of the judgment could be effective with British Timken and French Timken under defendant's control, modification of the divestiture section as defendant proposes would defeat the basic objective of the judgment.

This objective was to remove previously existing barriers to competition between defendant, British Timken and French Timken. One of the principal means adopted by this Court in its judgment to achieve this objective was the elimination of defendant's financial interests in these potential competitors. As long as defendant is interested in these companies either partially or wholly, competition between them will not exist. The financial interests will continue to serve, as they have in the past, as an inducement not to compete, and further acquisitions will serve only to increase the inducement. The acquisition by defendant of its stock interests in these companies was an original element of the illegal conspiracy, and the interests were used thereafter as an instrument to further the conspiracy. Defendant at no time used the influence arising from the interests other than to extend the various restrictive agreements which formed part of the conspiracy.[1] Anything short of

[1] These points were all made by plaintiff-appellee at the hearing on relief and in its brief on relief of October 24, 1949. That brief urged, in part, as follows:

> Defendant's investments in potentially competing companies were an integral part of the 1927-28 agreements, which continued the existing illegal conspiracy to suppress

a complete divestiture of these interests, and the prevention of future acquisition of similar interests, would interfere with the fundamental end sought to be accomplished by the judgment.

VI

United States v. *National Lead Company*, 63 F. Supp. 513, affd. 332 U.S. 319 (1947), is not, as defendant suggests on page 12 of its "Statement of Reasons Supporting Motion", a precedent for amendment of this Court's judgment.

Actually, defendant's suggestion comes somewhat late. It was not made at the hearing on relief, where the *National Lead* case was discussed in some detail. The various contingencies of the option agreements were known at that time, and provision could readily have been made in the judgment for their exercise upon the occurrence of any of the contingencies. Instead, the Court pro-

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competition. As such, they were an influencing factor in inducing the renewal of world territorial allocation that would otherwise have expired. [p. 4]

* * * *

As an integral part of the conspiracy whose purpose was thus to eliminate competition, on the part of coconspirators and outsiders alike, defendant's investments in British Timken and French Timken were factors which induced the continuation of the agreements to divide world territories that would otherwise have expired in 1928. [p. 5]

* * * *

The investments served initially, and have continued to serve, as an inducement to defendant not to compete with British Timken and French Timken [p. 5]

* * * *

The investments, though not giving defendant control of British Timken and French Timken, have given it a means of influencing those companies not to compete

hibited their exercise by enjoining further acquisition by defendant of British Timken or French Timken stock. Defendant is not now entitled to a further hearing on a question already decided.

Even assuming, however, that defendant's reference to the *Lead* case were timely, it would not alter the determination already made by this Court to order divestiture and prohibit future acquisitions. A number of factors, not present in this case, led the Court there to include in its divestiture provision the alternative of selling or buying. In the first place, the alternative language was adopted in that case with the understanding that the Government could object to any sale or acquisition later proposed by the defendants. Only one acquisition was in fact approved under the provision, that of a jointly owned Canadian corporation. Several considerations made this acquisition of relatively minor importance to the restoration of

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with defendant. In this way as well, they have been utilized as part of the illegal conspiracy. [p. 6]

* * * *

The influence possessed by defendant over British Timken and French Timken has been thrown in favor of continuing the illegal restrictions when the restrictive agreements were renewed in 1934, 1935 and 1938. [p. 7]

* * * *

. . . Those interests have served, and will continue to serve, within the meaning of the *Crescent Amusement* case (323 U. S. 173), as an inducement to defendant to continue its past illegal restraints. [p. 8]

* * * *

. . . The restrictive agreements were about to expire at the time the stock investments were made (F. 37), and the stock investments were among the factors which brought about the continuation of the illegal agreements. [p. 9]

competition. For example, the Canadian company acquired was not a manufacturer, and hence was not a potential exporter to the United States. Further, the Canadian company owned patents which could exclude National Lead exports to Canada, so that a sale of National Lead's stock to a third party would not have necessarily resulted in promoting exports to Canada. In addition, a difficulty existed to transfer of the Canadian company's stock to a stranger, since it was a private company, not a public company such as British Timken. The Canadian company's charter, as well as certain private agreements, contained restrictions which prohibited any stock transfer without consent of the board of directors. The Court felt that, while it could cancel a private contract between a defendant and a foreigner, as it had already done in the case of the cartel agreements, it could not amend the charter of a foreign corporation.

Notwithstanding these considerations, however, the court indicated that it might still have disapproved the acquisition, had the Government not objected to it too late. The Government had presented its objections to the acquisition at the time when the defendant, as required by judgment, offered its plan of divestiture to the court for approval. The acquisition had, however, been accomplished a year earlier, during the pendency of the appeal, and the Government and the court were notified of it at a hearing. At this hearing the court agreed with the Government that it had no power to approve the acquisition pending appeal, as requested by defendant. At the later hearing on the plan, however, the court decided that certain

statements made by Government counsel at the earlier hearing indicated approval of the acquisition, and estopped the Government from later objecting to the consummated transaction. The court stated that had the Government's position been made known sooner, the court might have framed its judgment differently.

The *National Lead* case was cited to the court by plaintiff-appellee, as we have previously stated, and discussed both orally and in the briefs which were exchanged on the subject of relief in this case. This Court properly adopted a divestiture section which did not contain an alternative permitting defendant to acquire further interests in the co-conspirator corporations which were its potential competitors. (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 152-3 (1948).) Such a choice given to defendant would have defeated the very purpose of the judgment, by allowing complete and permanent elimination, through integration, of the competition which had previously been suppressed by combination.

VII

Defendant is, in fact, requesting this Court to reconsider matters which it has already decided. Defendant's motion is based upon facts and contingencies which were known and in evidence prior to the entry of the judgment, and upon which this Court has already exercised its discretion.

For example, the fact that Dewar died does not, as suggested on page 12 of defendant's "Statement of Reason Supporting Motion", change or affect this Court's findings in relation to the "joint venture" alleged to have existed between defendant

and Dewar. This Court has found not only that it is doubtful that the joint venture ever existed, but also that even if it did exist it could not excuse the defendant's violations of law (Fg. 150, 154-5, 161-3).[2] If the defendant wishes to urge in the Supreme Court that Dewar's death has some affect upon this Court's holdings in regard to the joint venture, the fact of Dewar's death can, as hereinafter pointed out, be appropriately brought to the attention of the Supreme Court.

Defendant's motion should not be granted, as Circuit Justice Field said of a petition for rehearing on modification of an equity decree, "simply to allow a rehash of old arguments" (*Giant Powder Co.* v. *California V. P. Co.*, 5 Fed. 197, 201).

VIII

Granting defendant's motion will not, as claimed in paragraph 13 of the motion, "prevent unnecessary delay and prolixity in the final disposition of this cause both in this court and on appeal in the Supreme Court of the United States".

On the contrary, for this Court to vacate its judgment, either in whole or in part, and conduct further proceedings on relief, as suggested by defendant, would cause a completely unnecessary and unwarranted delay in the final disposition of this case. The facts alleged in defendant's motion in no way justify repetition of the careful proceed-

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[2] Defendant's statement on page 12 of its "Statement of Reasons Supporting Motion", that the option which it now wishes to exercise was "one provision of the agreement pursuant to which the joint venture was carried on" is an admission that the option agreements were, as plaintiff-appellee contended in its brief of October 24, 1949, "a continuation of the illegal conspiracy."

ings already conducted by this Court before framing its final judgment. Such further proceedings would serve only the purpose of delay.

Even assuming that there is some justification for inserting additional evidence in the record, a much more expeditious method exists than that proposed by defendant. Dewar's death, the only fact alleged in defendant's motion which could be considered "additional evidence",[3] could readily be brought to the Supreme Court's attention by affidavit or stipulation of counsel. In fact, a stipulation as to Dewar's death has been suggested by plaintiff-appellee's counsel.

It has been recognized that an appellate court may receive evidence outside the record of matters occurring after the judgment which may affect the reviewing court's action upon the judgment. *United States* v. *Aluminum Company of America*, 148 F. (2d) 416, 445-6 (C.C.A. 2, 1945). In that case, the court, sitting as a statutory court of last resort, accepted figures outside the record showing aluminum production as of March 1944, over 3½ years after the trial and 2 years after judgment, because such evidence had a bearing upon relief. The court refused to accept evidence of facts, such as Arkansas bauxite reserves in 1940, already existing before judgment but not in the record.

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[3] The other facts alleged by defendant are not new. The option agreements, as we have seen, were in evidence (D. Ex. 240, also introduced as P. Ex. 3 (Decree); D. Ex. 228). That the occurrence of one of the contingencies named in the option agreements would cause "the perfection of resulting rights", as stated in paragraph 14 of defendant's motion, was obvious on the face of the agreements. Defendant's desire to exercise the options is hardly an independent fact, and might be inferred from its past conduct; certainly the Supreme Court would accept counsel's statement as to such desire.

The rule was explained, in part, as follows (148 F. (2d) at 445-6):

> . . . There is no reason why an appellate court upon deciding an appeal from such a judgment should not direct the district court what judgment to enter; and so it often does. Nor is there any reason why in deciding what judgment to direct, it should not advise itself from outside the record of such facts as appear to admit of no genuine dispute; i.e. should take "notice" of whatever the district court itself might take "notice." . . . The case is otherwise as to any facts already existing in August, 1940, such as the amount of bauxite in Arkansas, as to which the "Truman Report" also contains figures. . . . We could not constitutionally substitute it for the findings of a court after a trial; facts which a court may judicially "notice" do not for that reason become indisputable. Wigmore, § 2567a. At most we could do no more than treat the report as newly discovered evidence, and send the issue back for another trial, which in the present case we should under no circumstances be willing to do. *For these reasons we refuse to take "notice" of facts relevant to the correctness of the findings; but we do take "notice" of those relevant to remedies.* [Emphasis supplied.]

Since the death of Dewar occurred after the judgment, it clearly may be noticed by the appellate court under the rule of the *Aluminum* case.[4] Cases

[4] A comment written shortly before the *Aluminum* decision had suggested the rule which was applied in that case to intervening facts. The author of the comment pointed out that the question whether facts arising after judgment and affecting the court's action may be shown in the reviewing court outside the record, "does not seem to have arisen under the old practice"; but expressed the view that "especially where they

cited by defendant, such as *Realty Acceptance Corp.* v. *Montgomery*, 284 U.S. 547 (1932), where the appellate court did not look outside the record, related to facts which occurred before judgment.[5]

In an action such as the present one, where the public interest requires a direct appeal to the Supreme Court (28 U.S.C. § 29), certainly a long delay should not be allowed for additional hearings in the District Court merely to place in the record a fact which could be covered by a stipulation or affidavit filed in the Supreme Court.[6] Having the fact of Dewar's death before it, the Supreme Court could give that fact whatever weight it merited.

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may be shown by incontrovertible evidence, there is no good reason for not permitting them to be proved in the reviewing court". Note, *Appeal and Error—New Evidence in the Appellate Court*, 56 Harv. L. Rev. 1313, 1324 (1943). The same writer distinguished, and criticized, the old practice barring an appellate court from considering evidence which arose before judgment but was not placed in the record, as being archaic and time-consuming, especially where the new evidence is incontrovertible. Note, *Appeal and Error—New Evidence in the Appellate Court, supra;* see also Case Comment *Appellate Practice—Shift of Position—Introduction of New Evidence*, 34 IA L. Rev. 521 (1949).

[5] Other cases cited by defendant also arose from facts occurring before judgment. *Baltimore S.S. Co.* v. *Phillips*, 9 F. (2d) 902; *United States* v. *Newbury Manufacturing Co.*, 123 F. (2d) 453; *Levinson* v. *United States*, 32 F. (2d) 449. In *Roemer* v. *Simon*, 91 U.S. 149 and *Hall* v. *United States*, 78 F. (2d) 168, both relating to newly discovered evidence, it is not possible to ascertain from the report whether the evidence related to facts arising before or after judgment. *In re Robertshaw*, 75 F. (2d) 203 and *Jensen* v. *New York Life Insurance Co.*, 59 F. (2d) 512 involve the determination by judicial bodies of legal issues, rather than the occurrence of facts, after judgment.

[6] The Supreme Court's liberality in accepting extrinsic evidence, even where it occurred before judgment, is demonstrated by its action in a recent case where it received an affidavit as to the fact, which was outside the record and had occurred before judgment, that a contract clause alleged to be illegal had been removed. *Automatic Radio Mfg. Co., Inc.* v. *Hazeltine*

The Court could, if it considered such action necessary, modify the provisions of the judgment. Or, it could affirm those provisions of the judgment not deemed affected by Dewar's death, and remand only the provisions affected to this Court for reconsideration. Or, if it agrees with plaintiff-appellee that no revision of the judgment is necessary or justified, it could affirm the judgment as it was entered by this Court on February 15, 1950.

Such procedure would certainly be a more expeditious method of inserting in the record the fact of Dewar's death for whatever bearing it may have on the issues of this case, than the lengthy and cumbersome one proposed by defendant in its motion. For this reason also, granting defendant's motion, rather than expediting, would materially delay the final disposition of the case.

IX

Defendant relies upon Rule 60(b) (5) and (6) of the Federal Rules of Civil Procedure as conferring power upon this Court to reconsider its final judgment. Rule 60(b), as amended in 1948, reads in part as follows:[7]

> On motion and upon such terms as are just, the Court may relieve a party of his legal representatives from a final judgment, order or

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Research, Inc., 339 U. S. 827, 835 (1950). See also *American Telephone & Telegraph Co.* v. *United States*, 229 U. S. 232, 241 (1936). The Supreme Court commonly accepts evidence of facts which will render a case moot. *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States* (1936) §§252-254.

[7] The background and history of Rule 60 are fully discussed in Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale Law Journal 623.

> proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed, or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application; or* (6) *any other reason justifying relief from the operation of the judgment.* [Emphasis supplied]

Rule 60(b), as set out above, is all-inclusive in that it defines the practice with respect to any and all rights or remedies to obtain relief from final judgments.[8] It is to be emphasized that the rule applies only to the *procedure* for vacating judgments and effects no change in the *substantive* law.[9]

The substantive law applicable to relief from judgments based upon changed circumstances, such as defendant alleges have occurred here, is derived from the inherent jurisdiction of courts of equity to adapt or modify continuing judgments as

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[8] *Report Prepared by the Advisory Committee on Rules for Civil Procedure*, 80th Cong. First Session, H. Doc. No. 473, p. 124.

[9] "It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgment, but merely prescribes the practice in proceedings to obtain relief." (*Report of Advisory Committee on Rules*, p. 128). See also, *Melekoff* v. *Collins* (D.C. Calif., 1939) 30 F. Supp. 159.

events may shape the need.[10] *U. S.* v. *Swift & Co.*, 286 U.S. 106 (1932) is the landmark case.

In the *Swift* case, a suit brought by the United States under the Sherman Act, a consent decree was entered in 1920 dissolving a monopolistic combination of meat packers and individually enjoining such packers from holding stock in cold storage plants and stock yard terminal railroads, from dealing in commodities not related to meat packing, and from selling meats and milk at retail. In April 1930, more than 10 years after entry of judgment, certain defendants filed petitions to modify the judgment and to adapt its restraints to the alleged changed conditions. Petitioners presented evidence of what they contended to be a substantial change in conditions in the industry. The Supreme Court of the District of Columbia modified the judgment to the extent of permitting defendants to deal in groceries at wholesale. All other modifications prayed for in the petition were denied. An appeal was thereupon taken to the Supreme Court.

The Supreme Court reversed the judgment of the court below which had modified the consent decree. The court, in an opinion by Mr. Justice Cardozo, first discussed the inherent power of a court of equity, upon a showing of changed conditions, to modify a judgment, whether entered by consent or after litigation (286 U.S. at 114-115). The court then discussed the question of whether or not evidence presented by petitioners of substantial change in conditions in the industry was sufficient to justify the exercise of the court's power

[10] Moore and Rodgers, *Federal Relief from Civil Judgments*, *supra*, at pp. 692, 643.

to modify the judgment. In reviewing the consent decree, the court found that the restraints upon the defendants relating to their sale of meats and groceries had been imposed because of the gigantic size of the individual defendants, and their capacity for eliminating the competition of smaller competitors. Against this background, the court held that there had been no change of conditions in the industry which would eliminate the need for restraint upon the individual defendants.

The court there specified the limitations imposed upon the exercise of its jurisdiction to modify continuing judgments and concluded that (p. 119):

> We are not framing a decree. We are asking ourselves whether *anything has happened that will justify us now in changing a decree.* The injunction, whether right or wrong, *is not subject to impeachment in its application to the conditions that existed at its making.* We are not at liberty to reverse under the guise of readjusting . . . *Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions* should lead us to change what was decreed after years of litigation with the consent of all concerned. (Emphasis supplied)

The doctrine of the *Swift* case requires that courts make careful inquiry whether or not anything has occurred since the entry of a judgment which will justify its modification. Judgments will not be reviewed in the light of conditions which existed at the time of entry, but rather on the basis of whether there are changed conditions which clearly result in grievous wrong arising from new and unforeseen

circumstances. Unless such changed conditions be clearly shown, modification will not be ordered. As we have previously pointed out, the facts alleged in defendant's motion relate only to matters previously considered by this Court and fail to disclose such changed conditions which make it inequitable that the judgment have prospective application.

The rule of the *Swift* case represents the substantive law applicable to proceedings under subsection (5) of Rule 60 (b), which prescribes the procedure for seeking modification of a judgment where it is no longer equitable that the judgment should have prospective application. Moore & Rogers, *Federal Relief from Civil Judgments, supra,* at 692, 643. Subsection (6) prescribes the procedure for seeking modification for any other reason justifying relief. That subsection is a catch-all and described by its proponent as a "general residual clause . . . to cover unforeseen contingencies." [11]

A survey of cases filed under Rule 60(b) (5) and (6) indicates that motions for modification or vacation of judgment have been granted only where the facts of the individual case show extreme hardship and injustice.[12] For example, in *Block* v. *Thou-*

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[11] Moore and Rogers, *Federal Relief from Civil Judgments, supra,* at p. 692.

[12] A conflict of opinion exists over a trial court's jurisdiction under Rule 60(b) to modify or vacate judgments after an appeal has been perfected. Some courts have held that an appeal terminates the power of a trial court to act. *Miller* v. *U. S.* (C.C.A. 7, 1940), 114 F. (2d) 267, cert. den. 313 U.S. 591; *Schram* v. *Safety Inv. Co.* (E.D. Michigan 1942) 45 F. Supp. 636; *Fiske* v. *Wallace* (C.C.A. 8, 1940), 115 F. (2d) 1003; *Piascik* v. *British Ministry of War Transport* (S.D. N.Y., 1949) 83 F. Supp. 518; Moore's *Federal Practice,* Vol. 3, Section 73.03 Supp. p. 413; *International Railway Co.* v. *Davidson* (W.D. N.Y. 1945) 65 F. Supp. 58, Barron and Holt-

sandfriend, (C.C.A. 2, 1948), 170 F. (2d) 428, where a motion was filed under subsections (5) and (6), the defendant landlord was granted relief from a judgment based on an order of local rent control authorities reducing his rents and requiring a refund, where, after entry of judgment, the refund order was set aside by the OPA administrator. *Grand Union Equipment Co.* v. *Lippner,* (C.C.A. 2, 1948) 167 F. (2d) 958, also concerned a

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zoff, *Federal Practice and Procedure,* Sec. 1332. Others have held that trial courts may consider such motions with leave of the appellate court. *Perlman* v. *332 West Seventy-Second Street Company* (C.C.A. 2, 1942) 127 F. (2d) 716. See also *S. C. Johnson and Son, Inc.* v. *Johnson* (C.C.A. 2, 1949) 175 F. (2d) 176.

With respect to Rule 60(a), the ambiguity as to which court, trial or appellate, has power to correct *clerical mistakes* pending an appeal, clearly has been recognized (*Federal Relief from Civil Judgment,* p. 686). In 1948, an amendment was adopted permitting trial courts to correct clerical errors pending appeal, with leave of the appellate court. (*Report of Advisory Committee on Rules,* p. 123). Unfortunately, the Advisory Committee has failed to recommend a similar amendment to Rule 60(b), under which this motion was filed, and the conflict of opinion still exists as to this latter subsection.

As previously stated, (*supra,* p. 25); Judge Rifkind held in the *National Lead* case that he had no power pending appeal to approve a plan submitted by a defendant under the divestiture section of the judgment, stating, "As I understand it I am at this point without power to act under Section 8 of the decree. Consequently I am not in a position either to approve or disapprove the proposed acquisition."

In the cases cited by defendant where additional evidence was received by trial courts after appeal, the appellate courts, under the special circumstances, had refused to consider such evidence. (See *supra,* n. 5). Consequently, unless the trial courts had been permitted to receive such evidence it would have been excluded from the consideration of the appellate courts. No such problem is raised in this case since under the circumstances here, as we have seen above (*supra,* pp. [illegible]), the appellate court can readily consider the facts alleged in defendant's motion, for whatever bearing they may have on the issues of the case.

motion filed under subsections (5) and (6). There an order was granted in a bankruptcy proceeding modifying an injunction against prosecution of claims against the debtor, where the purpose of the modification was to enable the creditor to reduce his claim to judgment so as to enable him to maintain an action on an insurance policy issued to the debtor.

Klapprot v. *United States,* 335 U.S. 601, was an action filed under subsection (6) of Rule 60(b). There the defendant Klapprot sought, after four years, to have a default judgment of denaturalization set aside on the ground that the judgment was entered against him while he was in prison awaiting trial on a selective service charge. He alleged that while confined to prison he was ill and was without funds to obtain counsel. He further alleged that after the conviction for the selective service charge had been reversed, he had been charged with sedition and that after that charge had been dismissed he had been held for some time for deportation. Mr. Justice Black, speaking for the court, set aside the default judgment on the basis of the treatment which the defendant had received and his inability to present his defense in the denaturalization proceedings, holding that subsection (6) enabled courts "to vacate judgments whenever such action is appropriate to accomplish justice." See also *United States* v. *Backofen* (C.C.A. 3, 1949) 176 F. (2d) 263. *United States* v. *Miller* (M.D. Pa., 1949) 9 F.R.D. 506, likewise granted relief from a default judgment in an action under Rule 60(b) (6) where a judgment for treble damages had been entered against a

party by default and *without notice* to such party, the amount of damage having been based upon nothing more than a *guess*.

The facts alleged in defendant's motion do not justify relief from the operation of the judgment under the cases describing the substantive law applicable to such relief. If defendant's motion is denied, it will not suffer extreme hardship or "grievous wrong," resulting from new or unforeseen circumstances. It is not necessary or appropriate for this Court to vacate or modify its judgment in order "to accomplish justice."

No events are alleged by defendant to have occurred which would make it "no longer equitable," as defendant states in paragraph 13 of its motion, that the provisions of this Court's judgment "should have prospective application," or which would otherwise justify modification or vacation of the judgment. In short, we have already seen that the option agreements relating to British Timken and French Timken stock were in evidence, and that the various contingencies named in these agreements, including that of Dewar's death, were before this Court when it found the existence of law violations and framed its judgment. The occurrence of one of these contingencies could not affect violations already consummated, nor the relief necessary to dissipate the effects of those violations. Thus, there has been no change in the factual basis of the Court's decision and judgment, nor are any new legal issues raised. The Court could have provided for the exercise of these options upon the occurrence of one or more of the contingencies, but instead elected to prohibit any further acquisitions of British Timken and

French Timken stock. Therefore, the Court has already decided the questions raised in defendant's motion based upon the occurrence of the contingency of Dewar's death.

WHEREFORE, plaintiff-appellee, the United States of America, prays the Court to deny in its entirety the defendant-appellant's motion that this Court, first obtaining leave of the Supreme Court of the United States, receive additional evidence, make additional findings of fact and conclusions of law, and vacate its entire judgment, or vacate and modify portions of Sections IV and VIII thereof.

Respectfully submitted,

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